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82-1245

No.

In The

SUPREME COURT OF THE UNITED STATES

____ TERM, A.D., 1983

RANDY MOWDER and ADULT WORLD,
Petitioners

vs.

PEOPLE EX REL J. WILLIAM ROBERTS,
STATE'S ATTORNEY, SANGAMON COUNTY,
ILLINOIS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

1. Did the Supreme Court of Illinois err in denying the Application for Stay when it failed to provide strict procedural safeguards to insure federally guaranteed constitutional rights?

2. Does the denial of the Stay by the Illinois Supreme Court deny the fundamental rights of petitioners during the pendency of the appeal; are the petitioners' rights to appeal effectively denied by the continuation of the injunction during the pendency of said appeal?

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To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Randy Mowder and Adult World, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois entered in the above-entitled case on the 21st day of December, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is unreported and is printed in Appendix A hereto, infra, page 1a. The judgment of the Court of Appeals of the State of Illinois is unreported, and is printed in Appendix B hereto, infra, page B1. The Entry of Judgment of the Circuit Court of the 7th Judicial Circuit of Illinois,

Sangamon County, is printed in Appendix C hereto, infra, page C1.

JURISDICTION

The judgment of the Appellate Court of the State of Illinois, 4th District (Appendix B, infra, page B1) was entered on the 7th day of December, 1982. A timely petition for stay with the Illinois Supreme Court, pursuant to the provisions of Illinois Supreme Court Rule 305 was filed with the Supreme Court of Illinois on the 7th day of December, 1982; and, thereafter, a request for direct expedited appeal to the Supreme Court (Appendix D, infra, page D1) was filed with the Supreme Court of Illinois on the 8th day of December, 1982. The Supreme Court of Illinois entered judg-judgment on the motion for stay, and

request for direct expedited appeal to the Supreme Court on the 21st day of December, 1982 (Appendix A, infra, page A1). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257 (3). The denial of the motion for stay, and motion for expedited direct appeal is a final judgment under the court's rulings in National Socialist Party of America vs. Village of Skokie, 432 U.S. 43, 53 L.Ed.2d 96, 97 S.Ct. 2205 (1977); Cohen v. Beneficial Loan Corp., 337 U.S. 541, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949).

QUESTIONS PRESENTED

1. Did the Supreme Court of Illinois err in denying the Application for Stay when it failed to provide strict procedural safeguards to insure

federally guaranteed constitutional rights?

2. Does the denial of the Stay by the Illinois Supreme Court deny the fundamental rights of petitioners during the pendency of the appeal; are the petitioners' rights to appeal effectively denied by the continuation of the injunction during the pendency of said appeal?

STATUTES INVOLVED

Illinois Revised Statute Chapter 100½:

> 1. House of assignation or prostitution-public nuisance
>
> § 1. That all buildings and apartments, and all places and the fixtures and movable contents thereof, used for purposes of lewdness, assignation, or prostitution, are hereby declared to be public nuisances, and may be abated as hereinafter provided. The owners, agents, and occupants of any such building or apartment, or of any such place shall be deemed guilty of maintaining a public nuisance, and may be

enjoined as hereinafter provided.

2. Injunction to abate-Temporary writ-Notice lessee party defendant

§ 2. The State's Attorney or any citizen of the county in which such a nuisance exists, may maintain a complaint, in the name of the People of the State of Illinois, perpetually to enjoin all persons from maintaining or permitting such nuisance, and to abate the same, and to enjoin the use of such building or apartment, or such place for any purpose, for a period of one year. Upon the filing of a verified petition therefor, in the circuit court, the court, if satisfied that the nuisance complained of exists, shall allow a temporary writ of injunction, with bond unless the petition is filed by the State's Attorney, in such amount as the court may determine, enjoining the defendant from maintaining any such nuisance within the jurisdiction of the court issuing such writ. No such injunction may issue, however, except on behalf of an owner or agent, unless it is made to appear to the satisfaction of the court that (1) the owner or agent of such

building or apartment or of such place, knew or had been personally served with a notice signed by the petitioner; (2) such notice has been served upon such owner or such agent of such building or apartment or place at least 5 days prior thereto; (3) such building or apartment or such place, specifically describing the same, was being so used, naming the date or dates of its being so used; and (4) such owner or agent had failed to abate such nuisance, or that upon diligent inquiry such owner or agent could not be found within the United States for the service of such preliminary notice. The lessee, if any, of the building or apartment, or of the place shall be made a party defendant to such petition.
Amended by P.A. 79-1366, § 1, eff. Oct. 1, 1976.

. . .

5. Judgment of court-Sale of property-Fees, etc.

§ 5. If the existence of the nuisance is established, the court shall enter a judgment perpetually restraining all persons from maintaining or

permitting such nuisance, and from using the building or apartment, or the place in which the same is maintained for any purpose for a period of one year thereafter, unless such judgment is sooner vacated, as provided in this Act, and perpetually restraining the defendant from maintaining any such nuisance within the jurisdiction of the court. While the judgment remains in effect, such building or apartment, or such place shall be in the custody of the court. An order of abatement shall also issue as a part of such judgment, which order shall direct the sheriff of the county to remove from such building or apartment, or such place all fixtures and movable property used in conducting or aiding or abetting such nuisance, and to sell the same in the manner provided by law for the sale of chattels under execution, and to close such building or apartment or such place against its use for any purpose, and to keep it closed for a period of one year unless sooner released as hereinafter provided. The sheriff's fees for removing and selling the movable property shall be taxed as a part of the costs, and shall be the same as those for levying upon and selling like property under

execution. For closing the building and keeping it closed the court shall allow a reasonable fee to be taxed as part of the costs. No injunction may issue against an owner, nor may an order be entered requiring that any building or apartment, or any place be closed or kept closed, if it appears that such owner and his agent have in good faith endeavored to prevent such nuisance. Nothing in this Act authorizes any relief respecting any other apartment than that in which such a nuisance exists. Amended by P.A. 79-1366, §1, eff. Oct. 1, 1976.

Illinois Annotated Statute §110A Paragraph 301 (Supreme Court Rule 301):

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception need be taken in order to make any ruling or action of the court reviewable.

Illinois Annotated Statutes,

Chapter 110A Paragraph 305 (Supreme

Court Rule 305):

305. (Supreme Court Rule 305). Stay of Judgments Pending Appeal
(a) Stay of Enforcement of Judgment for Money Only.
(1) An appeal stays the enforcement of a judgment for money only if a notice of appeal is filed within 30 days after the entry of the judgment appealed from and a bond in a reasonable amount to secure the appellee is presented, approved, and filed within the same 30 days or within any extension of time granted under subparagraph (2) of this paragraph. Notice of the presentment of the bond shall be given to the appellee.

(2) On motion made within the same 30 days or any extension thereof, the time for the filing and approval of the bond may be extended by the trial court or by the reviewing court or a judge thereof, but the extension of time granted by the trial court may not aggregate more than 45 days unless the parties stipulate otherwise. A motion in the reviewing court for any extension of time for the filing and approval of the bond in the trial court must be supported by affidavit and

accompanied by either the record on appeal or such parts of it as are relevant.

(b) Stay of Enforcement of Judgments and Appealable Orders by Order of Court.

(1) On notice and motion, and an opportunity for opposing parties to be heard, the trial court, or the reviewing court or a judge thereof, may stay pending appeal the enforcement of a judgment for money only not stayed by compliance with paragraph (a) of this rule, or the enforcement, force and effect of any other final or interlocutory judgment or judicial or administrative order.

(2) Application for a stay ordinarily must be made in the first instance to the trial court. A motion for a stay may be made to the reviewing court, or to a judge thereof, but such a motion must show that application to the trial court is not practicable, or that the trial court has denied an application or has failed to afford the relief that the applicant has requested, and must be accompanied by suggestions in support of the motion and by the record on appeal or a short record.

(3) The stay, whether granted by the trial or reviewing court, shall be conditioned upon such terms as are just. A bond may be required in any case, and in the case of a judgment for money, or a stay for the protection of interests in property, shall be required

. . .

Constitution of Illinois, Article I, Section 12:

§ 12. Right to Remedy and Justice

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

United States Constitution, Amendment 1:

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

the Government for a redress of grievances.

United States Constitution, Amendment 14:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .

STATEMENT OF THE CASE

The petitioners' Statement of the Case contains specific references to pleadings filed in this cause. Because complete record had not been transcribed and certified and submitted to the

Illinois Appellate Court, the same cannot be referred to by transcript page. Under applicable rules of the Supreme Court of the State of Illinois, a "short record" or summary record of the pleadings as filed in the trial court was submitted to the appellate court for purposes of review upon petitioners' Application for Stay. Reference herein will be made to specific pleadings as submitted with the "short record".

On the 2nd day of June, 1982, a Complaint was filed by respondents herein alleging that Arthur Davis, Davis Development Company, AAA Superior, Inc., Randy Mowder, and Adult World were in violation of Chapter 100½, paragraph 1 et seq., of the Illinois Revised Statute by permitting a "nuisance" to exist at the premises described therein. The Complaint requested

that the court enter a decree perpetually restraining all persons from maintaining or permitting said nuisance and from using the premises for any purpose whatsoever for one year, and restraining your petitioners from maintaining any such nuisance within the jurisdiction of the court. The Complaint also asked the court to issue an order of abatement pursuant to the terms of the statute.

Thereafter, the trial court granted petitioners' counsel's petition to appear pro hac vice in this cause, and answer to the Complaint was filed on July 7, 1982, containing a general denial and further containing three affirmative defenses.

Thereafter, on the 21st day of September, 1982, a motion to strike and dismiss was filed on behalf of the petitioners, Randy Mowder and Adult

World, alleging that the notice requirements of the Illinois Revised Statute, Chapter 100½, Section 2, had not been complied with; requesting that the court strike certain paragraphs of plaintiff's Complaint; requesting dismissal on the basis that the State of Illinois had an adequate remedy at law; and challenging the constitutionality of Chapter 100½ of the Illinois Revised Statute as in violation of the Fifth Amendment of the United States Constitution by requiring petitioners to defend a civil suit and testify in a civil manner in violation of their guaranteed rights. Thereafter, on the 20th day of September, 1982, at the oral argument on the Motion to Dismiss, counsel for the petitioners, Randy Mowder and Adult World, moved to amend their Motion to Dismiss to include allegations challenging the constitutionality of

Section 2, Chapter 100½, of the Illinois Revised Statute on the basis that said statute violated guaranteed rights under the due process provisions and guarantees of the 14th Amendment of the United States Constitution because of the vagueness and uncertainty of the terms and the lack of definitions contained therein. The motion to amend was granted by the court without objection by the State. Plaintiff further argued and amended his motion to include allegations that the provisions of the statute and application by the court in not allowing petitioners an opportunity to abate the alleged nuisance also violated provisions of the United States Constitution. Said motion to strike and dismiss was denied.

On the 29th day of September, 1982, the matter came before the court for trial

on the merits, the same was heard, and the court entered judgment as more specifically set forth in Appendix C (infra, page 1c).

Thereafter, your petitioners filed with the trial court a Motion for Stay Pending Appeal, or in the Alternative Request for Setting of Bond in this matter and at said time also filed their Post-Trial Motion and a Motion to Amend the Motion to Strike and Motion to Dismiss by Interlineation to include those matters brought up at the oral argument on the motion. On the 8th day of November, 1982, the court granted the written motion to amend the motion to strike and dismiss by interlineation, and petitioners presented oral testimony and evidence to the court in support of their Motion for Stay. Petitioners

argued that the Illinois statutes and constitution guaranteed them a right to appeal and should the court deny the Motion for Stay, they were effectively denying the right to appeal the decision of the trial court. Argument was centered around the fact that certain time limitations were required on appeal, and for consideration by the Court of Appeals and Illinois Supreme Court. By virtue of the fact that the statute allows the injunction as to the property to continue for a period of one year, it was conceivable that the appeal could last longer than said time, thereby rendering the issues on appeal moot. Petitioners further argued that they maintained certain fundamental guaranteed rights under the provisions of the 14th Amendment to earn a livelihood and operate a business, and

that the business, building, lease, and employment opportunities were property rights under provisions of the 14th Amendment of the United States Constitution, which would be denied during the pendency of the appeal. The trial court denied the Motion for Stay.

On the 23rd day of November, 1982, petitioners filed with the Appellate Court of the State of Illinois, an Application for Stay, requesting that the court grant a stay of all relief as ordered by the trial court during the pendency of the appeal. On the 3rd day of December, 1982, the Illinois Court of Appeals granted the Motion for Stay in part (as to the abatement as ordered) and denied it as to the injunctive relief (Appendix B, infra, page 1b)

On the 7th day of December, 1982, the petitioners filed with the Supreme

Court of the State of Illinois their Application for Stay pursuant to Supreme Court Rule 305. Petitioners alleged as a basis for their application for stay that the denial of the same would deny petitioners their constitutional right of appeal in review of the trial court's decision, and further deny guaranteed rights under the 14th Amendment of the United States Constitution. On December 8, 1982, petitioners filed their Request for Direct Expedited Appeal to the Supreme Court (Appendix D, infra, page 1d).

Petitioners then filed their citation of additional authority in support of the motion for stay with the Illinois Supreme Court. Said citation was filed on or about the 15th day of December, 1982, and alleged in addition to the

allegations set forth in the Application for Stay that fundamental rights as guaranteed under the 1st Amendment of the United States Constitution would be denied petitioner should the Stay Pending Appeal be denied. Petitioners cited as additional authority the cases of National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 53 L.Ed. 2d 96, 97 S.Ct. 2205 (1977); and Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981). On the 21st day of December, 1982, the Supreme Court of Illinois denied the Application for Stay and affirmed the decision of the Appellate Court as related to petitioners in the writing set forth as Appendix A (infra, page 1a).

REASONS FOR GRANTING WRIT

The issue in this case is whether basic fundamental rights are being denied to the petitioners during the pendency of the appeal by the denial of the Illinois Supreme Court to grant a stay of the injunctive relief and a direct expedited appeal. Ancillary to this issue is the question as to whether the State of Illinois has provided adequate procedural safeguards to protect those rights of the petitioner during the pendency of the action. Is there a "compelling state interest" or "sufficient public interest" present to justify the denial of the stay?

In some aspects, this case is one of first impression before the court. Some of the questions which must be answered are whether the "Adult World"

maintains fundamental protected rights under provisions of the 1st and 14th Amendments to the United States Constitution which are entitled to strict scrutiny and the "compelling state interest test", when determining the appropriateness of legislation or rulings. As stated in New York State Ice Co., v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932):

> The right to engage in a lawful business or profession without arbitrary restraints is a 'fundamental right' within the protection of the 14th Amendment.

Although most of the cases applying the "compelling state interest" test refer to an act of legislation effecting a business or protected right, petitioners feel that such a test would apply in the determination as to the appropriateness of a stay.

To determine which test (rational basis or compelling state interest) should be applied in the given circumstance, the Supreme Court in Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) suggest that three factors should be considered. Those three factors are, 1) character or basis of discrimination; 2) interest of the individual subject to the discrimination; 3) the governmental interest at stake.

In applying these factors to the individual case, the character or basis of the denial is the injunction itself. It denies the petitioners their livelihood, and right to operate the business while the appeal is pending. The interest of the individual or business subject to the discrimination are those interests and fundamental rights under

provisions of the 1st and 14th Amendments.

Petitioners conted that the Supreme Court's ruling in the case of Schad v. Borough of Mt. Ephrian, 452 U.S. 61, 67 L.Ed.2d 671, 101 S.Ct. 2176 (1981), would extend to the business which is the subject of this case. As the evidence in this cause demonstrated, the business in question was an establishment which offered "sensitivity sessions" to customers for payment of a fee, and also included modeling, nude modeling, and photographic sessions for payment of the fee. A fee was paid up front and the customer then was allowed to go to a private room with the model of his choice. He then could "tip" or give compensation for the choice of apparel of the model. This included the model wearing what

the customer brought in or the model appearing nude. Most models appeared nude at the request of the customer. At this point, the model could then apply the sensitivity which was a light fingertip touching of the body or light massage. In addition, a customer could, if requested, photograph a nude model or have a nude model pose as he wished. Petitioners contend that the extension of 1st Amendment rights of freedom of expression as stated by the court in Schad v. Borough of Mt. Ephrian (supra) apply to the type of business which is the subject of this cause. The court itself held that actions of the models within petitioners' business were "lewd" under terms of the statute on the basis of the nude modeling and photography sessions. The 1st

Amendment protections of freedom of expression referring to nude dancing in Schad v. Borough of Mt. Ephrian (supra) would necessarily extend to nude modeling and nude sessions within petitioners' establishment.

Rights of privacy and consensual private acts are also protected fundamental rights under the 1st Amendment of the United States Constitution.

The leading case of Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) set forth the fundamental right of association and privacy in individual relationships afforded under the United States Constitution. Although the factual setting in Griswold is entirely different from that in the present case, those rights of privacy and association extend to consensual private acts between adults.

As stated by the Supreme Court in discussing the privacy rights:

> In other words, the 1st Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members . . .

Although Griswold v. Connecticut (supra) referred to the private rights of the marriage relationship, those rights of privacy and association and consensual private acts between adults can and should be extended to the facts in the case at hand. The only acts which occur in the establishment which is the subject of this cause are consensual acts between adults in private rooms. Such consensual acts should be entitled to the same rights of privacy and freedoms guaranteed by

the 1st Amendment, the 5th Amendment, and 14th Amendment as those acts committed in the marriage relationship, or within ones private homes as recognized in Griswold v. Connecticut (supra). We would further refer the court to Mr. Justice Goldberg's concurring opinion in Griswold v. Connecticut (supra) where it is stated:

> . . . In some, the 9th Amendment simply lends strong support to the view that the 'liberty' protected by the 5th and 14th Amendments were an infringement by the federal government or the states is not restricted to rights specifically mentioned in the first eight amendments . . .
>
> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a

> principle is 'so rooted [there] . . . as to be ranked as fundamental . . . I agree fully with the court that, applying these tests, the right of privacy is a fundamental personal right, 'emanating from the totality of the constitutional scheme under which we live.' . . .

The thrust of petitioners' argument is that they maintain certain fundamental and guaranteed rights under the United States Constitution which are entitled to protection and strict scrutiny. Those rights are the right to privacy, liberty, and association as set forth above. The general right of privacy has been viewed as emanating from the 1st Amendment's guarantee of freedom of association, NAACP v. Alabama 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1388, __ S.Ct. ___ (1958); and of speech, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the 4th Amendment, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); the

Equal Protection Clause of the 14th Amendment, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the 9th Amendment, Griswald v. Connecticut (supra); the penumbras of the Bill of Rights, Griswald v. Connecticut, (supra); and the concept of liberty guaranteed by the Due Process Clause of the 14th Amendment, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The concept of freedom of speech or expression as extending to nude entertainment was established most recently in the case of Schad v. Borough of Mt.Ephrian (supra) by the United States Supreme Court in holding that such entertainment is entitled to protection by the provisions of the 1st Amendment of the United States Constitution. This protection should necessarily extend to nude performances or adult entertainment in a private setting where such acts are specifically limited to persons above the age of 18 and consist of only voluntary acts between

consenting persons in a private room. The Supreme Court has recognized the right to privacy as it applies to sexual relations in marriage (Griswald v. Connecticut, supra) and some decisions have interpreted Griswald as denying the state the right to regulate private marital relations. See Cotner v. Henry, 394 F.2d 873, 875 (7th Cir. 1968), Cert. Den. 393 U.S. 847, 89 S.Ct. 132, 21 L.Ed.2d 118. Worthy of noting is the comment in note 3, page 875 of Cotner v. Henry (supra) that "the American Law Institute Model Penal Code adopts the view that consensual private sexual conduct between adults should not ordinarily be subject to criminal sanction."

Petitioners realize that Griswald dealt with private relationships in the marriage, and they further realize that Cotner v. Henry (supra) and the American Law Institute Model Penal Code adoption refers more specifically to consensual acts between persons who would

better be described as "intimate" or "lovers" than it applies specifically to matters relating to sex in private places such as "massage parlors", "modeling centers", or other establishments. However, the protection afforded by the Constitution should necessarily extend to those persons and establishments where such private, consensual conduct takes place. The Supreme Court later, in the case of Eisenstadt v. Baird, 405 U.S. 438, 31 L.Ed.2d 349, 92 S.Ct. 1029 (1972) extended the Griswald (supra) concept to consenting adults not married to each other. The next necessary extension of that concept would apply to the case at hand, thereby demonstrating that there are in fact fundamental, guaranteed and protected rights of petitioners in this cause which are directly effected by the denial of the stay by the Illinois Supreme Court.

As stated by the court in Schad v. Borough of Mt. Ephrian (supra, at 101 S. Ct. 2181) nor may an entertainment program be prohibited solely because it displays the nude human figure. "Nudity alone" does not place otherwise protected material outside the mantel of the First Amendment. . .

This statement in Schad v. Borough of Mt. Ephrian (supra) shows clearly that because "nudity" was involved in this particular cause, does not remove it from the realm of protected freedoms that have been set forth above.

Regarding the consensual private acts of adults being rights which are fundamental and protected by the United States Constitution, petitioners make

a further analogy and refers the court to the case of State v. Pilcher (Sup. Ct. Iowa, 1976), 242 NW2d 348, a case wherein the defendant Pilcher appealed from a judgment imposed following his conviction by a jury of the crime of sodomy in violation of the Iowa Code. Although several issues were presented for review, defendant primarily challenged the constitutionality of the statute on the basis that (1) it was an improper exercise of police power; (2) it violated the due process and equal protection clauses; (3) it was unconstitutionally vague and overbroad; (4) it invaded the right to privacy; and (5) it implemented cruel and unusual punishment.

The Iowa Supreme Court, in addressing the allegations as to unconstitutionality for violation of the due process

and equal protection clauses, and unconstitutionality as to the invasion of privacy stated at Page 356:

> We conclude the defendant has standing to question the constitutionality of the sodomy statute as it applies to the private, consensual acts of adult persons of the opposite sex not married to each other as an invasion of personal rights.
>
> We do not understand defendant to question the power of a state to constitutionally regulate sexual activity involving adult corruption of minors or forceful non-consenting sexual behavior between adults and to render criminal such sexual activities.
>
> It has been concluded a defendant convicted of forced or public sodomy does not have standing to assert the rights of married or unmarried consenting adults to engage in such private or sexual activities. See Carter v. State, 255 Ark. 225, 500 S.W.2d 368, 373, Cert. Den. 416 U.S. 905, 94 S.Ct. 1610, 410 L.Ed.2d

110; People v. Sharpe, 183 Solo. 64, 514 P.2d 1138, 1140-1141 (1973); Hughes v. State, 14 Md. App. 497, 287 A.2d 299, 303-304, Cert. Den., 409 U.S. 1025, 93 S.Ct. 469, 34 L.Ed.2d, 317; Jones v. State, 85 Nev. 411, 456 P.2d 429, 430-431; Byrd v. State, 65 Wis. 2d 415, 222 N.W.2d 696, 699-700; United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa. 1973) (Brewer denied standing to prisoners to assert the rights of consenting adults); Lovisi v. Slayton, 363 F. Supp. 620, 624 (E.D. Va. Richmond Division 1973); and Swikert v. Cady, 381 F. Supp. 988, 989 (E.D. Wis. 1974).

The main and most compelling thrust of any argument against a sodomy statute's constitutionality entails assertion that the emerging right of privacy protects private sexual activity between consenting adults of the opposite sex not married to each other. The general right of privacy '. . . has been viewed as emanating from the First Amendment's guarantee of freedom of association,

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); and of speech, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the Fourth Amendment, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); the Equal Protection Clause of the 14th Amendment, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967); the 9th Amendment, Griswald v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg J. Concurring); the Penumbras of the Bill of Rights, Id.; and the concept of liberty guaranteed by the Due Process Clause of the 14th Amendment, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The court is satisfied that the candid approach of Roe v. Wade, supra, and of Mr. Justice Harlan's concurrence in Griswald v. Connecticut, supra, 381 U.S. at 499, 85 S.Ct. 1678, that the Due Process Clause of the 14th Amendment provides substantive protection for

fundamental human values 'implicit in the concept of ordered liberty'. Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L. Ed. 288 (1937), represents the preferred view . . .' Lovisi v. Slayton, supra, 363 F. Supp. 620, 624.

The Supreme Court has recognized the right to privacy as it applies to sexual relations. Thus, in Griswald v. Connecticut, supra, a statute prohibiting the use and distribution of contraceptives was struck down on the basis it operated '. . . directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. 381 U.S. at 482, 85 S.Ct. at 1680, 14 L.Ed.2d at 513.

. . .

The Buchanon Court (Wade v. Buchanon, 401 U.S. 989, 91 S.Ct. 1221, 28 L.Ed.2d 521 (1971) and 401 U.S. 989, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971)) recognized a state's power to regulate

'sexual promiscuity or misconduct' but agreed with Griswald such 'regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' (Griswald, 381 U.S. at 485, 85 S.Ct. at 1682, quoting from NAACP v. Alabama 377, U.S. 288, 307, 84 S. Ct. 1302, 1314, 12 L.Ed. 325 (1964). 308 F. Supp. at 733.

. . .

The next step taken in this area is that the state may not interfere with the private sexual actions of consenting adults of the opposite sex not married to each other. This reasoning has often found its basis in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349, a case which held the different treatment afforded married and unmarried persons as to the availability of contraceptives was not grounded on a rational difference. Thus, the statute violated equal protection. The court, through Justice Brennan, reasoned this was so under either of two situations: (1) if under Griswald the distribution

of contraceptives to married persons could not be prohibited due to the right of privacy, then such right would enure equally to individuals; (2) if Griswald does not bar the state's prohibition on the distribution of contraceptives, the state could not allow married persons such a right but deny to unmarried individuals. 405 U.S. at 453-454, 92 S.Ct. at 1038, 31 L.Ed.2d at 362.

The Eisenstadt Court further stated:

> It is true that in Griswald the right of privacy in question adhered in the marital relationship. Yet the marital couple is not an independent entity with mind and heart of its own, but an association of two individuals each with a separate intellect and emotional makeup. . . . (citing authorities). 405 U.S. at 453, 92 S.Ct. at 1038, 31 L.Ed.2d at 362.

. . .

> In our opinion, the rationale expressed in Eisenstadt extends to protect the manner of sexual relations performed in private between consenting adults of the opposite sex not married to each other.
>
> Before the state can encroach into recognized areas of fundmanetal rights, such as the personal right of privacy, there must exist a subordinating interest which is compelling and necessary, not merely related, to the accomplishment of a permissible state policy. Griswald v. Connecticut, 381 U.S. at 497-498, 85 S.Ct. at 1688-1689, 14 L.Ed.2d at 522, 523 (Goldberg, J. Concurring). The state has not shown the existence of any such interest here.

. . .

Again, although State v. Pilcher (supra) is not factually the same as the case at hand, it does go on to extend fundamental rights to consensual

private acts between adults.

The arguments heretofore have demonstrated two basic facts for the court's consideration. First, that petitioners enjoy the basic fundamental rights. Not only do they enjoy the right to appeal under provisions of the Illinois Code (Illinois Annotated Statutes §110A Paragraph 301); the right to engage in a lawful business and fundamental guarantees of liberty (United States Constitution, 14th Amendment); but they also enjoy fundamental guaranteed rights under provisions of the 1st, 9th and 14th Amendments as regards the freedoms of speech, expression and association (United States Constitution, 1st Amendment; Schad v. Borough of Mt. Ephrian (supra); and also the guaranteed and fundamental rights of privacy (1st and 14th Amendments of the United

States Constituion; Griswald v. Connecticut (supra); Eisenstadt v. Baird (supra); State v. Pilcher (supra).

The second reason for the above-mentioned argument is to demonstrate that not only are the fundamental guaranteed rights present and guaranteed to the petitioners, but they are in fact being denied by the action of the Illinois Supreme Court in the denial of the stay. During the pendency of the appeal, petitioners are not allowed to operate their business in any way or manner, nor are they allowed to exercise their property rights in the lease, building or personal property which exists at the location upon which the injunction was granted. The injunction itself, as to the property, extends for a period of one year pursuant to the terms of the statute. It is conceiv-

able that the appeal itself, with the various time limitations for filings of records, briefs and other matters, and possible oral argument plus consideration by the court could extend for a period of more than one year. If that is the case, then it virtually destroys any right of appeal by petitioners on that issue of injunction as it extends to the property, because the appeal itself and any decision may well be made at a time subsequent to the expiration of the one year injunctive period.

Further, petitioners are denied the right to operate their business and denied the basic guaranteed rights as set forth above during the pendency of the appeal if the stay is not granted. The State of Illinois has demonstrated no compelling state interest, as is necessary when

fundamental rights are effected to justify the denial of the stay during the pendency of the appeal. All rights and remedies of the State of Illinois as secured by their judgment in the trial court will be available to the State of Illinois upon completion of the appeal should the petitioners not be successful. There is no prejudice to the State of Illinois, and they have shown no interest compelling or otherwise in maintaining the injunction during the pendency of this appeal. There are no procedural safeguards to guarantee that the rights as guaranteed to the petitioners as set forth herein will not be infringed during the pendency of the appeal, and without such procedural safeguards, and with the lack of prejudice to the state and more substantial, the lack of any compelling state

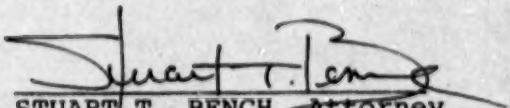
interest to justify the denial of these rights, the denial of stay was clearly improper. The stay in the Appellate Court during the pendency of the appeal would serve only to protect those rights as guaranteed to petitioners, and would deny no rights, nor substantial interests to the people nor the State of Illinois during the time the appeal is pending.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted, and in the event the petition is granted, petitioners pray that the judgment and decision of the Illinois Supreme Court in denial of the stay be reversed and this cause be ordered stayed pending appeal in this cause, and for all other relief

just and proper in the premises.

Respectfully submitted,



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